Supreme Court of the United States

October Term 1950

No. 89

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

MICHAEL M. KEARNEY, and MICHAEL M. KEARNEY and CLINTON M. HESTER, a Special Partnership, and MICHAEL M. KEARNEY and CLINTON MONROE HESTER, a General Partnership D/B/A Law Offices, CLINTON M. HESTER,
Petitioners.

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

The petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Claims in the above case.

Opinion Below

The opinion of the United States Court of Claims (R. 144) is reported at 285 F. 2d 797.

Jurisdiction

The order of the United States Court of Claims dismissing petitioners' claim was entered on January 18, 1961 (R. 148). A Motion for rehearing was filed March

22, 1961, and was denied on March 31, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1255(1).

Statement

Petitioners were employed on behalf of R. Stanley Dollar, the Dollar Steamship Line, and others hereinafter referred to as Dollars to institute suit against the officials of the United States Maritime Commission in their individual capacities, to replevin certain shares of common and preferred stock of the Dollar Steamship Line, Inc., Ltd. (R. 2). In this suit the Dollars alleged that these shares were surrendered to the Maritime Commission in 1938 as *substituted collateral* to secure a debt then due the Commission. This debt was *fully repaid* in 1943, but the Maritime officials without lawful authority withheld the shares, consisting of 113,206 Class A and 2,100,000 Class B, under the claim that the shares belonged to the United States (R. 2).

Petitioners' employment with the Dollars was under a contingent fee contract. They were to receive as compensation 225,000 shares of the Class B stock in suit if they secured redelivery of all the shares to the Dollars. Petitioners were to receive nothing for their services if they were unsuccessful (R. 2). At that time the "A" shares had a market value of around $15.00 and the "B" shares around $3.00 (R. 129). Petitioners share, if successful, would have been less than 10% of the total value of the stock sought to be replevined.

The Court of Appeals for the District of Columbia Circuit ruled that the Dollars were entitled to immediate possession of the stock, 184 F. 2d 245, reversing 82 F. Supp. 919 (D. D. C. 1948). The Supreme Court denied certiorari, 340 U. S. 884 (1950). When the individual mem-

bers of the Maritime Commission and the Secretary of Commerce, Charles Sawyer, refused to endorse and deliver the stock, they were adjudged to be in contempt of Court, 190 F. 2d 623 (D. C. Cir. 1951).

Simultaneously the Attorney General instituted a suit in the District Court for the Northern District of California to allegedly quiet title to the stock. In this suit the Attorney General for the *second time* alleged ownership of the stock to be in the United States. This was a repetition of the claim made by the Attorney General on behalf of the Maritime Commission and determined adversely by the Court of Appeals for the District of Columbia, 184 F. 2d 245, *supra*.

Finally, on March 16, 1951, the five stock certificates representing all of the above shares were delivered to the petitioners' offices, 432 Shoreham Building, Washington, D. C. They were namely Certificates No. BX-26 (2,099,994 Class B); No. BX-27 (1 Class B); No. BX-28 (5 Class B); No. AX-10 (63,893 Class A); No. A-150 (49,313 Class A) (R. 137).

Prohibitory injunctions were thereupon issued by the District Court for the Northern District of California, preventing the further exercise or transfer of the shares.

Thereupon the Dollars on June 12, 1952, were induced, because of the Government's threat of indefinite litigation, to enter into a compromise (R. 6-7).

Under the terms of the compromise the stock was transferred to a trustee who was directed to sell it at public sale and distribute the proceeds between the United States and the Dollars. Petitioners timely objected to this compromise and notice was given to all interested parties (R. 7).

On October 31, 1952, the trustee sold the 2,100,000 shares of Class B stock and a portion of the Class A, namely, 100,145 shares, leaving a balance of 13,061 shares of Class A. The sale brought approximately $18,000,000. The government accepted $9,000,000 as its alleged share (R. 8).

The 13,061 shares of Class A were a part of APL Certificate AX-10, which was one of the five certificates ordered delivered by the District Court to petitioners' offices on March 16, 1951 (R. 137). This stock, accordingly was part of the Dollar litigation and was subject to petitioners charging attorney's lien on the favorable judgment. It was in the name of Mortimer Fleichhacker (R. 10).

This block of stock was sold by the trustee on July 8, 1953, and the proceeds, amounting to $376,000, were distributed 60% to the Dollars and 40% to the government (R. 10).

When plaintiffs became aware of the above compromise agreement and after giving notice to all concerned, they sought to enforce their charging attorney lien rights in the judgment and the stock by an action against the Dollars in a Delaware State Court. The United States was not made a party to this suit since it had not consented to be sued (R. 9). Petitioners sought to enforce their attorneys' charging lien rights in the entire fund of stock and to obtain possession of 225,000 shares of Class B stock (R. 7). The Trustee had publicly announced he was about to sell the stock. The Delaware Court, upon petitioners' application, refused to enjoin the trustee's sale of the stock unless petitioners posted a bond in the prohibitive amount of $1,000,000.00, whereupon petitioners withdrew their motion and the sale was thereupon consummated the same day (R. 8). The government's share of the proceeds

($9,000,000.) was thereupon deposited into the United States Treasury beyond the jurisdiction of the Delaware Courts.

Several months later, and before notice of trial had been served and without knowing that the block of 13,061 "A" shares had not yet been sold in the lot of 100,145 aforementioned, petitioners accepted $75,000.00 from some of the Dollars for attorney fees. Petitioners then dismissed the Delaware suit (R. 9).

Petitioners in the present suit alleged that they possessed a valid charging attorney's lien which arose by operation of law and attached to all of the stock, which right vested in them when the Court of Appeals for the District of Columbia adjudged the Dollars entitled to possession of all the shares of stock (R. 4). They further alleged that the compromise settlement between the Dollars and the Secretary of Commerce was illegal, because without authority of law (R. 6). In addition it was contended that the Maritime Commission was enjoined by the District of Columbia Court from selling or otherwise disposing of the stock during the litigation and that the Dollars were subsequently enjoined by the District Court for the Northern District of California from disposing of the stock.

Petitioners alleged in the present suit that the United States *never had a proprietary interest* in the stock after the loan to the Dollars was *repaid*, and by accepting a share of the proceeds from the sale of the stock ($9,354,469.90) the United States has been *unjustly enriched at the expense of the petitioners*. This allegation has *not been denied* by the Government (R. 10).

The United States Court of Claims ordered petitioners' claim dismissed on motion of the United States on the *sole* ground that the fee agreement "gave over to peti-

tioners an interest in their client's claim against the Government" in violation of the Anti-Assignment Statute (R. 148).

Statutes Involved

The pertinent provisions of the Anti-Assignment Statute (R. S. 3477, 31 U. S. C. Sec. 203) are set forth in the appendix, *infra*, p. 13.

Question Presented

Whether an otherwise valid charging attorney's lien on a judgment, arising by operation of law under the law of the District of Columbia and measured by an attorney's fee agreement, which provided that if the attorney was successful in *replevining* certain chattels "2,213,206 shares of corporate stock" "unlawfully" withheld by individual officials of the Maritime Commission, the attorney was to receive a certain portion thereof (225,000 Class B shares), is a nullity under the Anti-Assignment Statute, R. S. 3477, 31 U. S. C. Sec. 203.

Reasons for Granting the Writ

The decision of the United States Court of Claims that petitioners' lien is a nullity under the Anti-Assignment statute is in conflict with the decisions of the Court of Appeals for the District of Columbia in *Wardman* v. *Leopold*, 85 F. 2d 277 (1936) cert. den. 299 U. S. 570; *Sanborn* v. *Maxwell*, 18 App. D. C. 245, 252; *Dollar* v. *Land*, 154 F. 2d 307, 311; and the decisions of the Court of Appeals, Second Circuit, in the cases of *Malman* v. *United States*, 202 F. 2d 483, 484 (1953), rehearing den. 207 F. 2d 897 (1953) and *Brooks* v. *Mandell-Witte Co.*, 54 F. 2d 992, 995. Certiorari should be granted to re-

solve and reconcile these recognized conflicts [1] and thereby secure greater uniformity in the interpretation and application of the Anti-Assignment Statute by the Federal Courts.

The specific question presented here is one which has never been passed upon by this Court. It should be decided because of its vital importance, not only to petitioners but to the ever increasing number of persons with claims against corporate agencies of the government similar to the Maritime Commission, and the present uncertainty concerning the applicability of the Anti-Assignment statute to lawyers who represent such claimants on a contingency basis.

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[1] See Comment of Judge Walsh, *Kleiger* v. *McMahon* (D. C. N. Y.), 128 F. Supp. 741

BRIEF IN SUPPORT OF PETITION

Specification of Errors to Be Urged

The United States Court of Claims erred:

1. In holding that the fee contract "between the petitioners and the Dollars gave over to petitioners an interest in their clients' claim against the *Government*".

2. In holding that the case at bar is controlled by the United States Court of Claims decision in *Pittman* v. *United States*, 127 Ct. Cl. 173, 116 F. Supp. 576, cert. denied 348 U. S. 815 (1954).

3. In holding that the attorney's charging lien asserted by petitioners is a nullity under the provisions of the Anti-Assignment Statute.

Argument

The Anti-Assignment Statute is a statute designed to protect the sovereign United States against multiple claims for money. It has no application here, where the claim was never asserted by petitioner's clients against the *United States*, and was for the replevin of corporate stock, unlawfully withheld by unauthorized government agents, *no money claim* being involved.

1. Petitioners' fee contract did not give them "an interest in their client's claim against the United States" because the client's claim was at all times asserted by petitioners against *individual members of the Maritime Commission* or alternatively against the Maritime Commission as a *corporate entity* separate and apart from

the *United States*. The Court of Claims erroneously concluded that petitioners' fee agreement was to replevy the stock from the *United States*, whereas this Court has held to the contrary, namely, that the Dollar suit was to replevy the stock from the individual members of the Commission, *Dollar* v. *Land*, 330 U. S. 731. Accordingly, petitioners' fee contract did not involve a claim against the *United States* so as to make the provisions of R. S. 3477 applicable.

2. The Maritime Commission was held by the Court of Appeals for the District of Columbia to be a *corporate entity* separate from the United States under Sec. 207 of the Merchant Marine Act of 1936, *Dollar* v. *Land*, 154 F. 2d 307, 311.

The general rule is that the assignment of claims against such a corporate governmental agency is not void or forbidden under R. S. 3477 forbidding assignment of unliquidated claims against the United States. *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.*, 3 F. 2d 154, 155; *Charles Nelson Co.* v. *United States*, 11 F. 2d 906; *Rhodes* v. *United States*, 8 F. Supp. 124, 126.

3. Even assuming for the purpose of argument that the original Dollar Claim of replevin for the stock was against the United States under some statute authorizing such a proceeding, petitioners' lien here would not be invalid under the Anti-Assignment statute because it is well settled where as here (there being no set-off) that the petitioners' charging lien, which arose by operation of law, attached by operation of law, and such an assignment is outside the prohibitions of R. S. 3477. *Wardman* v. *Leopold*, 85 F. 2d 277 (App. D. C. 1936), cert. den. 299 U. S. 570 (1936), *Houston* v. *Ormes*, 252 U. S. 469, affirming 47 App. D. C. 364.

Any assignment occurring in the establishment or enforcement of petitioners' charging attorneys lien under District of Columbia law was by "*operation of law*" and arose at the time of the Court of Appeals order requiring the fund of stock to be restored to the Dollars. Petitioners' charging lien was therefore within the *exception* and not in violation of the Anti-Assignment Statute.

The District of Columbia recognizes the common law right of an attorney to a charging lien upon the *judgment, decree or award for his expenses or compensation for the services in procuring the same*: *Lamont* v. *Washington & G. R. R. Co.*, 2 Mackey (D. C.) 502, 505, 47 Am. Rep. 268.

The District of Columbia recognizes by operation of law charging attorneys' lien on the property itself recovered by the judgment provided the attorney *as here* looked to the property recovered, through his efforts, for his fee. *Lyman* v. *Campbell*, 182 F. 2d 700; *Ingersoll* v. *Coram*, 211 U. S. 335, 368.

4. The United States Attorney General was served with the complaint in the District Court replevin action. He came in voluntarily on behalf of the individual members of the Maritime Commission and the United States like any other claimant. He claimed absolute ownership on behalf of the United States which claim was denied. The United States therefore has no basis to invoke the Anti-Assignment Statute against petitioners since it failed after a lengthy trial to establish a proprietary interest in said stock. *In Re Washington Square Slum Clearance*, 5 N. Y. 2d 300, 310, 157 N. E. 2d 587, 592, cert. den. sub nom Coblentz 363 U. S. 841.

5. The case of *Pittman* v. *United States, supra*, upon which the Court of Claims relied, is clearly distinguishable.

In *Pittman* the suit was admittedly against the United States for money under the Wartime Contract Settlement Act, 41 U. S. C. Sec. 117. It also involved a *set-off* against the claimant under the Set-Off Act, 18 Stat. 481, as amended 47 Stat. 1516, 31 U. S. C. Sec. 227 and the Claimant admittedly *owed the United States a valid debt.*

In the instant case the claim was against individuals or an entity separate from the United States (Maritime Commission) and was for the replevin of chattels and not a claim for money. Further *no valid debt has been established* to entitle the United States to apply the Set-Off statute to the Dollars. Clearly the Anti-Assignment Statute under those circumstances has no applications to the case at bar. The primary purpose of the Anti-Assignment Statute as stated is to protect the United States and not *unauthorized agents* of the United States. Only a replevin suit against unauthorized government agents was involved in petitioners' fee contract.

6. All of the stock was ordered delivered to petitioners as attorneys for the Dollars on March 16, 1951 at their offices 432 Shoreham Building, Washington, D. C. The stock was delivered on that date endorsed in blank. It is submitted that since the stock was so delivered it was thereafter beyond the original purpose of affording protection to the United States and R. S. 3477 would therefore have no application.

Conclusion

Since the question presented has never been decided before by this Court and is of national importance in the administration of Federal law, and since the decision below conflicts in several important respects with the decisions of two Courts of Appeals, petitioners submit that this court should grant the writ of certiorari.

Respectfully submitted,

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April 1961

APPENDIX

The pertinent provisions of the Anti-Assignment Statute, R. S. §3477, 35 Stat. 411, as amended, 31 U. S. C. §203, read as follows:

> §203. All transfers and assignments made by any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. • • •